Supreme Court, U.S.
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No. 97-1807

In The

Supreme Court of the United States

October Term, 1997

CLEAN (Citizens for Leaders with Ethics and Accountability Now!), a Washington non-profit corporation, et al.,

Petitioners,

vs.

CITY OF SPOKANE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

If a city charter does not provide a right of referendum regarding emergency ordinances, is a First Amendment right implicated by the city's adoption of an emergency ordinance which is not subject to referendum?

RULE 29.6 STATEMENT

Respondents Citizens Realty Company and Lincoln Investment Company of Spokane are closely-held, non-public Washington corporations. Citizens Realty Company is a wholly-owned subsidiary of Cowles Publishing Company, a Washington corporation. Neither corporation has any subsidiaries other than wholly-owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Citizens Realty Company and Lincoln Investment Company of Spokane respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Washington Supreme Court's opinion in this case. In part, the Petition asks this Court to review the judgment of the Washington Supreme Court in an earlier case which is not now subject to direct review. Further, the present case does not raise a substantial question of federal law requiring resolution by this Court. Finally, this case simply involves the Washington Supreme Court's reliance upon well-established prior Washington precedent and the application of a properly stated rule of law. This case does not warrant review by this Court.

I. STATEMENT OF THE CASE

This Petition arises from three cases challenging the validity of a municipal ordinance authorizing limited support of a redevelopment project in downtown Spokane, Washington. The project includes a Nordstrom store, retail mall, and parking garage. The Washington Supreme Court upheld the ordinance in the face of a myriad of state law claims brought by Petitioners.

The Petition contains several misstatements of fact, including allegations in its "Statement of the Case" that are wholly unsupported by any reference to the record.[1]

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[1] For example, Petitioners assert on page 7 of the Petition that the Respondents' statements regarding the necessity for

To the extent the Court requires a more accurate summary of the facts of this case, Respondents request that the Court consider the recitation of facts set forth in the Washington Supreme Court's majority opinion in this case.

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prompt City action were false. Contrary to Petitioners' assertion, Respondents did move as speedily as possible to consummate various details of the downtown redevelopment project after the City passed the ordinance on January 27, 1997. Passage of the ordinance provided the necessary assurances to tenants and prospective lenders concerning the City's commitment to move forward with the project. A lease with Eddie Bauer was consummated in April of 1997 and construction of that store began in May and was completed in August 1997, as was removal of asbestos in other portions of the project. After removal of the asbestos, demolition of existing buildings began in November of 1997. While Respondents would have preferred to commence demolition sooner than that, Petitioners' filing of the instant lawsuit in Spokane County Superior Court in February of 1997, raising some sixteen different issues relating to the project, created an impediment to final consummation of details between Respondents and various tenants and lenders. Once the Washington Supreme Court rejected all issues raised by Petitioners in its expedited decision, announced on November 13, 1997 following oral argument on June 8, 1997, demolition commenced within ten days. It is disingenuous for Petitioners to suggest that Respondents did not act expeditiously to follow up on the ordinance, when it was Petitioners' lawsuit that caused a major delay in commencement of a substantial portion of the project.

II. REASONS PETITION SHOULD BE DENIED

A. The Washington Supreme Court's Judgment in *CLEAN v. State* Is Not Subject to Direct Review

Much of the Petition focuses on perceived flaws in the Washington Supreme Court's decision in *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1996) ("*CLEAN I*"). Petitioner CLEAN was also a party to that case, but chose not to seek review by this Court. The judgment in *CLEAN I* is not now subject to direct review.[2]

Petitioners repeatedly point to the *CLEAN I* decision, and acknowledge that they are "essentially asking this Court to review both of the Washington court's recent decisions." Pet. at 14 (referring to *CLEAN I* and this case). Petitioners also refer to the facts of the *CLEAN I* case as if they were relevant to this matter, and invite this Court to decide questions which have no significance to this case, such as "Is Ken Griffey, Jr. more important than the Constitution?" Pet. at 15. Any request for review of the Washington court's decision in *CLEAN I*, together with the Petitioners' invitation to revisit the facts of *CLEAN I*, should be denied as untimely.

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[2] Sup. Ct. R. 13.1 (petition for writ of certiorari to review judgment of state court of last resort must be filed within ninety days after entry of judgment).

B. This Case Does Not Present an Important Question of Federal Law Requiring Decision by this Court

This Court has long recognized that its jurisdiction over the decisions of state courts is limited to cases involving substantial federal questions. The Court has stated:

> The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise. And it is not likely to be presumed that Congress acted upon a principle which implies a distrust of their integrity or their ability to construe those laws correctly.

Murdock v. City of Memphis, 87 U.S. (20 Wall) 590, 630 (1875). This jurisdictional limit is now formalized in 28 U.S.C. § 1257. *See also Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

The Petition is wholly deficient because it fails to set forth any meaningful theory under which this Court's jurisdiction can or should be exercised under 28 U.S.C. § 1257(a). Rather, Petitioners seek review of a state court decision that addresses only state law issues and presents absolutely no underlying federal questions or claims. Petitioners essentially assert that this Court should review this case because the state courts are incapable of ruling fairly on matters related to the scope of a state- or city-created right of referendum. *See* Pet. at 18.

As summarized above, this case involved numerous state law causes of action regarding the validity of an

ordinance adopted by the Spokane, Washington City Council. Petitioners do not assert that any federal questions were presented for decision at the trial court level or in the Washington Supreme Court. It is clear that no federal question was decided by either the trial court or the Washington Supreme Court. The purported federal claim advanced by Petitioners, which was raised for the first time in a motion for reconsideration after the Washington Supreme Court's decision, is that their First Amendment rights were violated because the court applied a new rule of law that abridged their "fundamental right of referendum." Pet. at 3. This assertion fails to state any viable federal claim, and certainly does not present an important question of federal law requiring resolution by this Court.

The Petition proposes that this Court resolve a question "not yet decided" in *Meyer v. Grant*, 486 U.S. 414 (1988) – whether the First Amendment's protection of core political speech encompasses the scope of initiative and referendum rights. Pet. at 21. Petitioners request that the Court consider this issue rests on the dual implication that this case involves 1) a right guaranteed by the Washington constitution, the interpretation of which will have broad impacts beyond this case, and 2) an issue with respect to which there is some uncertainty in the courts. Neither argument is correct.

Contrary to the statements of Petitioners, this case does not involve a right of referendum guaranteed by the Washington Constitution. Pet. at 21. This case presents a narrow issue involving the referendum process set forth in the City Charter of Spokane, Washington. *See* Pet. at 2-3 (providing excerpts of relevant charter provisions).

Such a local right of referendum is not created or required by the Washington Constitution. *See O'Day v. King County*, 109 Wn.2d 796, 815, 749 P.2d 142 (1988). Instead, Washington municipalities may choose whether or not to provide their citizens with the opportunity to engage in the referendum process at the local level. If they elect to provide a right of referendum, the scope of that right is determined in reference to the municipality's charter. *Id.*[3] As a result, this case is of limited applicability beyond that small set of persons, including Petitioners, who might attempt to file a referendum in the City of Spokane. The case presents no federal question of broad importance or legal issues of national concern, and is not an appropriate case for review on *certiorari*.

This case also does not present any open questions which require resolution by this Court. *Meyer*, relied on by Petitioners, considered the constitutionality of a Colorado statute which criminalized the practice of paying persons to circulate initiative petitions that were expressly permitted by state law. The Court held that state restrictions on the circulation of initiative petitions impacted core political speech, and should be subject to heightened First Amendment scrutiny. 486 U.S. 420-422. Petitioners assert that *Meyer* left undecided the issue of

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[3] The Washington Supreme Court in this case properly applied the Spokane City Charter in order to determine the availability of a referendum. Pet. App. at 15a-16a. The Court looked to its prior decision in *CLEAN I*, which involved the referendum right guaranteed in the state constitution, because that case interpreted emergency clause language contained in both the Spokane City Charter and the Washington Constitution. Pet. App. at 16a.

whether a state may restrict "the core" of its citizens' right of initiative and referendum consistent with the First Amendment. Pet. at 16-17. However, the Court in *Meyer* in fact recognized that states are not required to grant a right of referendum or initiative, and have the power to ban these avenues entirely. The Court quoted with approval the Tenth Circuit Court of Appeals' holding that "*[h]aving decided to confer the right* [of initiative], the State was obligated to do so in a manner consistent with the Constitution . . . " 486 U.S. at 420 (emphasis added). In reviewing the Court of Appeals' decision in an earlier case, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Court further stated that "it [*Posadas*] does not support the position that *the power to ban initiatives entirely* includes the power to limit discussion of political issues . . . " 486 U.S. at 425 (emphasis added).[4]

Meyer thus acknowledged the distinction between state restrictions on the circulation of initiative petitions, which process implicates core political speech, and a state's general regulations regarding the availability of the initiative or referendum process, which does not. This case involves the latter. The Spokane City Charter has *never* provided a right of referendum with respect to ordinances that are immediately effective as a result of a legislative determination of emergency. Spokane City Charter Sections 19(a)(1); 83. (Set forth in Pet. at 2-3).

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[4] These determinations are consistent with the general rule that states have the power to regulate their elections and access to their ballots. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Pursuant to *Meyer*, the City of Spokane has the authority to determine whether and in what circumstances it will make the right of referendum available, and it has exercised this authority to decline to provide referendum rights with respect to emergency ordinances. Nothing in the Washington Supreme Court's decision in this case alters the scope of this referendum right or creates a new restriction on the right to seek a referendum in the City of Spokane. There can be no First Amendment violation where, as here, the power to seek a referendum as to an emergency ordinance has never existed.

Moreover, there is no conflict among the lower courts that have considered whether there is a First Amendment right to engage in an initiative or referendum. In *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1188 (1998), the Court of Appeals held that "[c]learly, the right to a state initiative process is not a right guaranteed by the United States Constitution, but is a right created by state law." *Id.* at 1113. Similarly, the Eleventh Circuit held in *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996), *rehearing denied en banc*, 99 F.3d 1157 and *cert. denied*, 117 S.Ct. 1086 (1997), that the "right to place a citizen initiative proposal on the ballot is a state created right" and not a right guaranteed by the First Amendment. *Id.* at 1497-98. The Tenth Circuit also recently held that *Meyer* does not require states to maintain petition processes that in essence allow unrestricted access to the ballot. *American Constitutional Law Foundation v. Meyer*, 120 F.3d 1092, 1097 (10th Cir. 1997), *cert. granted*, 118 S.Ct. 1033, and *cert. denied*, 118 S.Ct. 1045 (1998). These decisions are entirely consistent with *Meyer's* recognition that restrictions on the scope of the initiative and referendum

process are different than restrictions on communication about the content of an initiative, and demonstrate the lack of an open issue or conflict requiring resolution by this Court.[5]

C. This Case Involves Only The Application of a Properly Stated Rule of Law

A petition is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law.[6] This case involves the Washington Supreme Court's *proper* application of a properly stated rule of law, making review especially inappropriate. Contrary to the assertions of Petitioners, this case does not involve a new abridgment of core political speech or any fundamental right of the citizens of Spokane, but merely applies the Spokane City Charter's long-standing prohibition on the exercise of the right of referendum with respect to emergency legislation. The Washington Supreme Court here interpreted the language of the City Charter by referring to long-standing judicial decisions interpreting similar language in the Washington Constitution.

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[5] Petitioners recognize that this case does not raise the question whether a state may repeal provisions of its Constitution, or add new restrictions to the right of initiative and referendum through constitutional amendment. Pet. at 18. This is true, because the case does not 1) involve the Washington Constitution, or 2) concern the addition of any new restrictions on the right of referendum in the City of Spokane. The "restriction" claimed by Petitioners has always existed, because the right of referendum has never existed with respect to emergency ordinances.

[6] Sup. Ct. R. 10.

The standard applied in this case has been consistently applied by past Washington courts. The Washington Supreme Court has repeatedly held that:

> Legislative declarations of fact, such as the existence of an emergency, are deemed conclusive unless they are "obviously false and a palpable attempt at dissimulation."

Pet. App. at 16a-17a; *CLEAN I*, 130 Wn.2d at 807; *City of Tacoma v. Luvene*, 118 Wn.2d 826, 851, 827 P.2d 1374 (1992); *State ex rel Hamilton v. Martin*, 173 Wash. 249, 257, 23 P.2d 1 (1933). Contrary to Petitioners' arguments, this standard was not first recited in *CLEAN I*, and the application of this standard in this case does not create a new rule of law. *See* Pet. at 19-21. Here, the Washington Supreme Court simply followed prior well-developed Washington precedent to determine whether the right of referendum was available with respect to the ordinance at issue. This situation does not warrant review by this Court.

III. CONCLUSION

The Washington Supreme Court correctly ruled that the City of Spokane ordinance at the heart of this case was valid under state law. The court's decision raises no federal issue of substantial importance requiring resolution by this Court, but rather involves the application of a

properly stated long-standing rule of Washington law. The Petition should be denied.

Dated this 2nd day of June, 1998.

Respectfully submitted,

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